No. 91-471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALABAMA DEPARTMENT OF REVENUE; and JAMES M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE,

Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a state law that (1) imposes a substantial in-state burden corresponding to the burden of a higher disposal fee imposed on out-of-state hazardous waste, and (2) confers a substantial out-of-state benefit corresponding to the in-state benefit of a lower disposal fee, is consistent with the Commerce Clause.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. Their concerns include preserving the authority of States to respond in responsible and appropriate ways to the acute problems posed by a national shortage of hazardous waste disposal sites. By accepting hazardous waste generated throughout the United States, Alabama has shown itself to be a responsible participant in the interstate market for the commercial disposal of hazardous waste. Reversal of the judgment below would prevent Alabama from sharing, in a constitutionally permissible manner, the burdens as well as the benefits arising from its unique national role. *Amici* accordingly submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

Amici adopt respondents' statement of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Alabama is a responsible actor in the interstate market for the commercial disposal of hazardous waste. The EPA has identified seventy-four counties in thirty-six States that have potential hazardous waste disposal sites. *See* J.A. 103-105. The trial court found that "hazardous waste landfills can be designed and engineered to operate in practically every state." Pet. App. 57a. Nevertheless, most States are absent from the interstate market for

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Court.

landfill disposal of hazardous wastes. Alabama is one of only sixteen States that have commercial hazardous waste landfills, and most of the other fifteen States participate in the market on a much smaller scale. *See* Jeffrey D. Smith, *Hazardous Waste Landfill Facility Information*, EI Digest, Mar. 1992, at 26-27 (Table 1) (hereinafter "EI Digest").

Petitioner Chemical Waste Management's facility at Emelle, Alabama is the largest of the twenty-one commercial hazardous waste landfills located in these sixteen States. *See* Pet. Br. 8; EI Digest at 26-27 (Table 1). The Emelle facility has a total permitted capacity of 21.4 million cubic yards. Emelle's capacity substantially exceeds the total combined capacity of ten facilities in ten States, and likewise exceeds the total combined capacity of six facilities in three other States. *Id.* The capacity at Emelle is more than double the capacity of a single facility in a fourteenth State. The permitted landfill capacity for hazardous wastes in Alabama is matched by only one State, California, which has three facilities with a total permitted capacity of 22.5 million cubic yards. *See* EI Digest at 26-27 (Table 1).[2]

These capacity statistics in fact understate the extent of Alabama's role in the interstate market. As of 1990, the United States reported that Emelle is "the ultimate depository for over one third of the

[2] Alabama's prominent place among the handful of States that play a major role in this interstate market is likely to continue. Emelle has a very high percentage of the available undeveloped acres at the twenty-one existing facilities. Although data are not reported for four facilities, the 1,725 undeveloped acres at Emelle are more than twice the total of 824.8 undeveloped acres at twelve facilities in eleven States. *See* EI Digest at 26-27 (Table 1).

waste materials shipped off-site from Superfund [cleanup] sites." Pet. Br. 8. The trial court found that Emelle "received two years ago approximately 17% of all hazardous wastes commercially landfilled in the United States." Pet. App. 58a. Emelle is one of only eight landfills in seven States that are licensed to dispose of electrical equipment containing polychlorinated biphenyls (PCBs) and other PCB wastes. Brief for *Amici Curiae* American Iron and Steel Institute *et al.* in Support of Petition at 8 & n. 5.

As the respondents demonstrate in their Statement of the Case, and as the United States recognizes (Br. at 19), Alabama has well-founded health and safety concerns arising from the landfill disposal at Emelle of hazardous wastes that pose serious environmental and health risks. The large volumes of hazardous wastes that are landfilled each year at Emelle heighten the State's concern about these risks. In 1985, 341,000 tons of hazardous waste were deposited at Emelle. By 1989 this had increased to 791,000 tons. J.A. 23.

Notwithstanding a 1990 statute establishing an "additional fee" for out-of-state hazardous wastes, Alabama continues to play a responsible role in the interstate market. The 1990 statute, which CWM challenges here, imposes "an additional fee . . . of $72.00 per ton" on "waste and substances which are generated outside of Alabama and disposed of at a commercial site for the disposal of hazardous waste or hazardous substances in Alabama." Ala. Code § 22-30B-2(b). Since the enactment of this statute, the high percentage of out-of-state hazardous wastes deposited at Emelle has remained constant.[3] The

[3] The total amount of hazardous waste deposited at Emelle decreased to 648,000 tons in 1990 and to 290,000 tons in 1991.

trial court found that, prior to the imposition of the additional fee, "[e]ighty-five to ninety percent of the tonnage permanently buried at Emelle is from out-of-state." Pet. App. 58a. From July 15, 1990, the effective date of the statute, through December 1990, 89.25% of the hazardous wastes deposited at Emelle were from out-of-state sources. For calendar year 1991, 88.66% of the hazardous wastes were from out-of-state sources. *High Court to Consider Extra Tax on Tainted Waste*, Montgomery Advertiser, Mar. 31, 1992, at 5A.

The validity of the additional fee does not turn, as petitioner and the United States argue, on a simplistic analysis of the statute as discriminating on its face between out-of-state hazardous waste generators and in-state hazardous waste generators. Any allocation of the benefits and burdens on in-state and out-of-state interests must also take into account Alabama's determination to authorize hazardous waste landfills. Alabama imposes on its citizens all the burdens of providing a permanent site for the disposal of hazardous waste that a great majority of the States do not impose on their citizens. This sub-

EI Digest at 26 (Table 1). This decrease, however, does not diminish Alabama's role as a responsible participant in the interstate hazardous waste disposal market. Even though the reduction in the volume of hazardous waste deposited at Emelle may be attributable in part to the additional fee, it is also attributable to other factors, such as the current recession and the related decline in generation of hazardous wastes. *See* EI Digest at 24. There were, for example, significant reductions in the volume of deposits at two other CWM commercial hazardous waste landfills from 1990 to 1991. In that one year period, volume at a CWM facility in Indiana declined from 200,000 to 100,000 tons, and volume at a CWM facility in Illinois declined from 240,000 tons to 67,000 tons. *Id.*

stantial in-state burden corresponds to the burden imposed by the additional fee on out-of-state interests. There is a similar correspondence between in-state and out-of-state benefits. Although in-state hazardous waste generators are not subject to the additional fee, out-of-state interests are accorded the benefit of avoiding the problems of disposing of the immense volume of hazardous wastes that are landfilled at the Emelle facility.

Amici submit that the additional fee is consistent with the Commerce Clause because Alabama's provision for hazardous waste landfill (1) imposes a substantial in-state burden that corresponds to the burden of the higher disposal fee imposed on out-of-state wastes, and (2) confers a substantial out-of-state benefit that corresponds to the in-state benefit of a lower disposal fee. The burdens imposed on the citizens of Alabama of providing a permanent site for the disposal of hazardous wastes justify the corresponding burden imposed on out-of-state interests by the differential fee. This scheme thus comports with the Court's Commerce Clause jurisprudence, which permits States to regulate the commercial disposal of hazardous wastes on terms that impose corresponding burdens on in-state and out-of-state interests.

ARGUMENT

THE "ADDITIONAL FEE" IS VALID BECAUSE STATE LAW IMPOSES A SUBSTANTIAL IN-STATE BURDEN THAT CORRESPONDS TO THE BURDEN IMPOSED ON OUT-OF-STATE WASTES, AND CONFERS A SUBSTANTIAL OUT-OF-STATE BENEFIT THAT CORRESPONDS TO THE IN-STATE BENEFIT OF A LOWER DISPOSAL FEE

A. The Validity Of State Laws Under The Dormant Commerce Clause Turns On A Careful Assessment Of The Burdens And Benefits Allocated To Both In-State And Out-Of-State Interests

This Court has long recognized that the dormant Commerce Clause imposes limits on state legislative power in the interest of promoting a national economic union. *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-39 (1949); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829). In determining these limits, the Court draws a fundamental distinction between state laws that burden interstate commerce and state laws that discriminate against interstate commerce. State laws that even-handedly impose burdens on both in-state and out-of-state interests are classified as "burdensome." State laws are said to be "discriminatory" where there is little or no burden on in-state interests that corresponds to any burden imposed on out-of-state interests. *See, e.g., Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 & n.12 (1992); *Maine v. Taylor*, 477 U.S. 131, 138 (1986).[4]

[4] This Court has recognized that the traditional deference accorded to state laws that burden both in-state and out-of-state interests is not warranted where a disproportionate burden is imposed on out-of-state interests. *Compare Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675-76 (1981) (Powell, J., judgment of the Court) *and Raymond*

The distinction between state laws that burden or discriminate against interstate commerce was originally stated by Justice (later Chief Justice) Stone. It rests on an assessment of the operation of state political processes and in particular on an analysis of (1) the allocation of burdens between in-state and out-of-state interests, and (2) the distribution of benefits between in-state and out-of-state interests. *See Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 n.2 (1945); *South Carolina Highway Department v. Barnwell Brothers*, 303 U.S. 177, 184 n.2, 187 (1938).

As a general rule, state laws that burden interstate commerce are valid if they serve legitimate state interests and if the burdens imposed on interstate commerce are not "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). State laws that discriminate against interstate commerce, however, are subject to a more demanding level of scrutiny and are invalid "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, 112 S. Ct. at 800. Moreover, "when the state statute amounts to simple economic protectionism," this Court has applied "a 'virtually *per se* rule of invalidity.'" *Id.* (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

Motor Transportation, Inc. v. Rice, 434 U.S. 429, 444 n.18 (1978) (both rejecting traditional presumption of validity of state highway safety laws that disproportionately burdened out-of-state interests) *with Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472-73 (1981) (deference to state environmental regulations imposing burdens on both in-state and out-of-state interests).

B. The General Rule That State Laws Imposing Burdens Exclusively On Out-Of-State Interests Are Invalid Does Not Apply To The Additional Fee

As a general matter, the distinction between burdensome and discriminatory state laws is salutary. Heightened scrutiny of state laws that discriminate against interstate commerce is warranted because such laws frequently threaten the free interstate market. When this Court has held state laws invalid because they were either discriminatory on their face or in their effect, the laws exclusively burdened out-of-state interests and reserved all benefits for in-state interests. In these cases, the States had attempted to promote their parochial interests at the expense of their sister States and had effectively opted out of the interstate market.

In *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), for example, this Court held that a facially discriminatory New Jersey law prohibiting the importation of most forms of solid waste violated the Commerce Clause. All of the burdens of the state law fell on out-of-state interests that were completely barred from access to New Jersey landfills, and no burdens were imposed on New Jersey citizens. All of the benefits of conserving scarce landfill space, minimizing pollution problems, and reducing waste disposal costs were reserved for New Jersey citizens, and no benefits were accorded to out-of-state interests. The overtly discriminatory Oklahoma statute held invalid in *Hughes v. Oklahoma*, 441 U.S. 332 (1979), also imposed burdens exclusively on out-of-state interests and reserved benefits exclusively for in-state interests. The Oklahoma prohibition on exporting natural minnows imposed all of its burdens on indi-

viduals who wished to use them outside of the State and reserved the benefit for those fishing in Oklahoma.

Although the North Carolina statute held invalid in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), was discriminatory in effect and not on its face, this statute, like those in *Philadelphia v. New Jersey* and *Hughes v. Oklahoma*, also imposed burdens exclusively on out-of-state interests and reserved benefits exclusively for in-state interests. This Court found that the burdens of compliance with North Carolina's apple grading standards fell solely on Washington apple growers. 432 U.S. at 351. Similarly, the benefits of the State's apple grading standards flowed exclusively to in-state apple growers because out-of-state apples would be down-graded to the standards satisfied by locally-grown apples. *Id.* at 351-52.

The additional fee is easily distinguishable from the discriminatory statutes held invalid in these and other cases. In sharp contrast to the state laws in *Philadelphia v. New Jersey*, *Hughes v. Oklahoma*, and *Hunt v. Washington State Apple Advertising Comm'n* that imposed burdens exclusively on out-of-state interests and reserved benefits exclusively for in-state interests, Alabama's provisions for the commercial disposal of hazardous waste impose burdens on both in-state and out-of-state interests and also confer a substantial benefit on out-of-state interests.[5]

[5] As discussed above, discriminatory state laws are subject to heightened scrutiny and usually invalidated. This Court has recognized, however, that state laws imposing burdens exclusively on out-of-state interests may be valid. *See New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988); *Maine v. Taylor*, 477 U.S. at 148 n.19; *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 26, 43 (1980). *See also Mintz v. Baldwin*, 289 U.S. 346 (1933). *Maine v. Taylor*, for example, upheld an overtly discriminatory Maine statute prohibiting the importation of live baitfish.

The quarantine cases likewise confirm the States' power to impose burdens exclusively on out-of-state interests to prevent exacerbation of existing in-state problems even when the State has not imposed any corresponding burden on in-state interests to solve these problems. Although the United States broadly asserts that the "quarantine statutes . . . are in fact evenhanded because all traffic . . . is prohibited," it concedes that some of the quarantine laws were discriminatory because the "cases do not explicitly search for an in-state equivalent to the discriminatory statutes." United States Br. at 24 & n.30. Of course, in the absence of an in-state burden equivalent to the out-of-state burden imposed by the quarantine's prohibition against importation of out-of-state items, the quarantine laws were in fact discriminatory.

To the extent that the quarantine cases noted in *Philadelphia v. New Jersey*, 437 U.S. at 628-29, involved statutes that were discriminatory because they imposed burdens exclusively on out-of-state interests, this Court's statement that the quarantine laws "simply prevented traffic in noxious articles, whatever their origin" (*id.* at 629) appears to be an overstatement. Many state laws, like the New York statute at issue in *Mintz v. Baldwin*, 289 U.S. 346 (1933), did not impose the same restrictions on in-state and out-of-state traffic. *See, e.g., Mintz v. Baldwin*, 2 F. Supp. 700, 715 (N.D.N.Y. 1933) (Cooper, J., dissenting) (discussing more burdensome certification requirements imposed on out-of-state cattle than in-state cattle), *aff'd*, 289 U.S. 346 (1933).

The analogy between discriminatory state laws prohibiting the importation of diseased fish and diseased cattle and the additional fee imposed on out-of-state hazardous wastes is carefully drawn in respondents' brief and is not repeated here.

C. Alabama's Regulation Of Hazardous Waste Does Not Burden Out-Of-State Interests Exclusively, And The Additional Fee Is Valid Because State Law Imposes Corresponding Burdens On In-State And Out-Of-State Interests

1. *Petitioner's Analysis of the Additional Fee Is Superficial and Incomplete*

Petitioner and the United States focus exclusively on the allocation of burdens between in-state and out-of-state waste generators. With respect to hazardous waste generators, the statute is admittedly discriminatory on its face: it imposes a $72 additional fee for imported hazardous wastes. Although petitioner and the United States would have this Court decide the case solely on the basis of the additional fee and the "discriminatory" label, the actual distribution of benefits and burdens is more complex. Catchwords and labels are not a substitute for analysis of the actual distribution of benefits and burdens between in-state and out-of-state interests made by Alabama's provisions for the commercial disposal of hazardous wastes. *See Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937). Looking beyond the narrow impact of the additional fee on waste generators, it is apparent that state law does not impose burdens exclusively on out-of-state interests. The State's provisions for commercial hazardous waste landfills are not discriminatory in fact because (1) they impose a substantial in-state burden that corresponds to the burden of the higher disposal fee imposed on out-of-state wastes, and (2) they confer a substantial out-of-state benefit that corresponds to the in-state benefit of a lower disposal fee.

Petitioner and the United States, however, view this case as raising questions about Alabama's power

to favor in-state hazardous waste generators against out-of-state hazardous waste generators, to insulate in-state businesses from out-of-state competition, or to reserve the Emelle facility for the benefit of its own citizens. Viewed in this superficial fashion, the additional fee is "discriminatory." This analysis, however, is fundamentally flawed.

There is simply no evidence in the record to support the conclusion that the differential fee was enacted either at the behest of or for the benefit of Alabama hazardous waste generators.[6] *Cf. Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. at 352 (overwhelming evidence that restrictions on imported apples were to serve the interests of in-state apple growers). Similarly, given the vast capacity of the Emelle facility,[7] there is no reason to believe that the State was acting to reserve limited hazardous waste disposal capacity for in-state hazardous waste generators. Petitioner's focus on the effect of the additional fee on waste generators is incomplete because it ignores the fact that Alabama has imposed other significant burdens on all of its citizens by permitting

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[6] If this Court were to adopt Professor Regan's powerful argument that the dormant or negative side of the Commerce Clause should prohibit only state laws whose purpose is "to advantage local actors at the expense of their foreign *competitors*," the differential fee would clearly be valid. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1095 (1986) (emphasis in original). There is no evidence that the purpose of the differential fee is to confer any advantage on in-state hazardous waste generators at the expense of their foreign competitors, out-of-state hazardous waste generators.

[7] The trial court found that "there is capacity at Emelle for another 100 years of operation." Pet. App. 58a.

the operation of a commercial hazardous waste disposal facility within its borders, and that these burdens correspond to the burden of the additional fee imposed on out-of-state generators.

2. *Alabama's Authorization of Commercial Hazardous Waste Landfills Imposes Substantial In-State Burdens*

By permitting the operation of a commercial hazardous waste landfill, Alabama imposes substantial health and safety risks on its citizens.[8] Given the trial court's finding that "hazardous waste generated in Alabama is just as dangerous as such waste generated in other states" (Pet. App. 86a), *amici* do not dispute the limited propositions, advanced by petitioner, that (1) the monetary costs of cleaning up problems created by the disposal of hazardous waste should be based on the volume of wastes deposited and that (2) a nondiscriminatory fee ensures that in-state and out-of-state waste generators will pay a proportional share of clean-up costs based on the volume of hazardous wastes deposited at Emelle. See Pet. Br. at 19, 29 n. 19.

These limited propositions, which are the linchpin of petitioner's argument, do not address Alabama's more fundamental concerns. The Alabama legislature correctly recognized that the disposal of hazardous wastes imposes on Alabama citizens the burdens of

[8] As set out in respondents' Statement of the Case, the record demonstrates that the disposal of hazardous wastes at the Emelle landfill poses serious threats to both human health and the environment and that there are significant questions whether waste disposal technology and federal standards provide adequate safeguards against either the short-term or the long-term risks.

potential environmental and health problems that simply cannot be "cleaned up" or "cured" by remedial expenditures. Alabama has thus imposed on its citizens substantial burdens that the majority of the States have not.[9] The risks that the Emelle site and the surrounding area may become permanently polluted or that the health of Alabama citizens may be impaired in ways or to an extent that no individual would accept voluntarily in exchange for money damages are borne exclusively by the citizens of Alabama. Even assuming that the federal regulatory scheme provides the best possible current guarantee of health and safety, the risk that the hazardous waste landfill at Emelle may prove to be another Times Beach or Love Canal is borne by the citizens of Alabama.[10] The State may properly take into account the wide range of health and environmental burdens that are now and may ultimately be imposed on its citizens. *See Maine v. Taylor*, 477 U.S. at 148 (States have "a legitimate interest in guarding

[9] When it imposed the additional fee, the legislature expressly found that:

> As the site for the ultimate burial of hazardous wastes and substances, the state incurs a permanent risk to the health of its people and the maintenance of its natural resources that is avoided by other states which ship their wastes to Alabama for disposal.

Ala. Act No. 90-326 § 1(d); Ala. Code § 22-30B-1(d) (Pet. App. at 103a).

[10] If, contrary to the record (*see* note 8 *supra*), one assumes that hazardous waste disposal technology is "fail safe," it is nonetheless the case that Alabama already has the burden of a negative reputation as the location of one of the nation's principal hazardous waste disposal facilities. This burden, which is analogous to the diminution of value of property located next to a noxious use, is substantial.

against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible").

The in-state burden of potential environmental and health problems that cannot be cured by remedial expenditures, while not easily measured in dollars like the out-of-state burden of the additional fee, is nonetheless substantial.[11] This burden on the citizens of Alabama exists regardless of the size of the existing pool of funds that might be used to alleviate health and environmental problems caused by a major disaster and regardless whether there is recourse to hazardous waste generators for additional funds. Thus, suggestions that there may be adequate remedial funds and that federal law ensures equal recourse to in-state and out-of-state hazardous waste generators for additional funds (Pet. Br. at 5, 34-35) do not address the permanent, persistent health and environmental problems that will remain long after the remedial actions are completed.

If in-state and out-of-state hazardous waste generators paid the same nondiscriminatory disposal fee, then the burdens of funding efforts to remedy environmental and health problems would be directly

[11] As a matter of common sense, the "NIMBY" (not-in-my-backyard) syndrome confirms the substantial in-state burden of disposing of out-of-state hazardous wastes. Although the need for safe disposal of hazardous wastes is widely acknowledged, most individuals would prefer that commercial hazardous waste landfills like Emelle be located as far away as possible. The substantial in-state burden of a hazardous waste landfill is demonstrated by the trial court's finding that since the effective date of RCRA in 1980, "only one additional hazardous waste landfill has been permitted." Pet. App. at 57a.

proportional to the volume of hazardous wastes generatod by in-state and out-of-state sources. Although both in-state and out-of-state hazardous waste generators (and indirectly in-state and out-of-state citizens) would bear these remedial burdens in proportion to their contribution to the problem, other burdens would not be allocated proportionately between in-state and out-of-state sources. Alabama citizens would bear all of the substantial burdens of environmental and health problems that cannot be "cleaned up" or "cured" by remedial expenditures. The additional fee is compensation for locating a potential Times Beach or Love Canal—an analogy that fully accords with public perceptions—in Alabama as opposed to locating the facility in another State.[12]

3. *Corresponding In-State and Out-Of-State Burdens and Benefits*

The correspondence between the out-of-state burden ($72 additional fee) and the in-state burden (environmental and health problems that cannot be remedied by subsequent expenditures)[13] is demonstrated in

[12] The purpose of the additional fee is not to create a fund for remedying environmental and health problems that may arise at commercial hazardous waste landfills. The proceeds of the additional fee are not paid into any special trust fund and are paid instead into the State's general treasury. Ala. Code § 22-30B-3 (Pet. App. 107a-108a). Since the proceeds of the additional fee are not devoted to the costs of any clean-up, there is no merit to the argument (Pet. Br. at 19) that it imposes a disproportionate share of the costs of cleaning up Emelle on out-of-state hazardous waste generators. The additional fee is better understood as compensation for the health and environmental burdens that will be borne in perpetuity by the citizenry of Alabama.

[13] In comparing in-state and out-of-state burdens, this Court has not imposed any requirement that the burdens must be

part by the fact that the establishment of the additional fee in 1990 did not change the high percentage of out-of-state hazardous wastes deposited at Emelle. *See* discussion *supra* at 4-5. The out-of-state burdens and the in-state burdens are logical trade-offs between exporters and importers of hazardous wastes.[14]

Just as Alabama law imposes corresponding out-of-state and in-state burdens, it also accords substantial out-of-state benefits corresponding to the in-state benefit of the additional fee. The thirty-four States that do not have commercial hazardous waste landfills are freed from the problems of disposing of the hazardous wastes that are landfilled in Alabama at the Emelle facility. These thirty-four States, as well as many of the fifteen States that have only limited

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exactly the same kind or imposed on identical out-of-state and in-state actors. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 472-73 (balancing benefits conferred on in-state pulpwood producers and burdens imposed on in-state dairies and milk retailers against burdens imposed on out-of-state producers of plastic resins). Such a requirement is unnecessary because the core concern is whether there is an in-state burden adequate to ensure that the state political process has balanced competing interests fairly. Here, the substantial in-state burden is adequate to ensure that Alabama fairly balanced the interest in providing landfills for hazardous wastes against the interest in avoiding substantial health and environmental problems.

[14] The general correspondence of these burdens is confirmed by the recommendation of the National Governors' Association that States be permitted to charge out-of-state waste generators a multiple of the base fee imposed on in-state waste generators. National Governors' Association, *Policy Positions 1991-92* 186 (*§ D-17.8 Hazardous Waste Management: Interstate Shipments of Hazardous Waste*) (hereinafter *"Policy Positions"*).

commercial hazardous waste disposal capacities, shift to Alabama and its citizens the risks that their territory may become permanently polluted and that the health of their citizens may be impaired in ways or to an extent no individual would accept in exchange for money damages.

4. *The Additional Fee Is "Demonstrably Justified by a Factor Unrelated to Economic Protectionism"*

In imposing the additional fee on out-of-state hazardous wastes, Alabama appropriately balanced the burdens imposed on in-state and out-of-state interests.[15] Although Alabama's provisions for commercial hazardous waste disposal are not discriminatory in fact because they impose burdens on both in-state and out-of-state interests, this Court traditionally subjects statutes that are overtly discriminatory to strict scrutiny. *See, e.g., Maine v. Taylor*, 477 U.S. at 138. As stated earlier this Term in *Wyoming v. Oklahoma*, state laws that discriminate against interstate commerce are invalid "unless the discrimination

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[15] The suggestion of *amici* that the state political process did not fairly balance these competing interests, *see* Br. *Am. Cur.* Hazardous Waste Treatment Council at 8, is mistaken. Although it is true that "a vote against the importation of *out-of-state* waste is an exceptionally easy vote for a state lawmaker to cast [because] there [is] no significant constituency *within* the state to protect the 'out-of-staters,'" *id.* (emphasis in original), this statement does not describe the vote actually made by Alabama lawmakers. Alabama lawmakers cast votes in favor of importation of out-of-state wastes, and a vote in favor of permitting hazardous waste disposal is as difficult as the hypothetical vote suggested by *amici* is easy. By voting in favor of permitting the disposal of imported hazardous waste subject to the additional fee, Alabama legislators appropriately balanced the burdens imposed on out-of-state interests against Alabama's burden of environmental and health problems.

is demonstrably justified by a valid factor unrelated to economic protectionism." 112 S. Ct. at 800; *see New Energy Co. v. Limbach*, 486 U.S. at 274. Thus, the " 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." 112 S. Ct. at 800 (quoting *New Energy Co. v. Limbach*, 486 at 273-74).

The Alabama additional fee provision satisfies this demanding standard.[16] As discussed above, it is compensation for all the incurable environmental and health problems that will exist in Alabama long after the site has been "cleaned up" and injuries to health have been "cured."

The additional fee provision does not compromise the fundamental prohibition of the Commerce Clause against economic protectionism. The record does not support any inference that the Alabama additional fee provision is "designed" to aid in-state hazardous waste generators in their competition with out-of-

[16] In cases decided before *Wyoming v. Oklahoma* and *New Energy Co. v. Limbach*, the Court formulated the standard in somewhat different terms and imposed a burden on the States to demonstrate that a discriminatory statute " 'serves a legitimate local purpose' " and that "this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. at 138 (quoting *Hughes v. Oklahoma*, 441 U.S. at 336). The additional fee provision also satisfies this standard. It serves the legitimate local purpose of compensating Alabama for assuming the burdens of substantial incurable environmental and health problems. There are no nondiscriminatory alternatives to imposing a differential fee on out-of-state waste generators because a nondiscriminatory disposal fee would force Alabama citizens alone to bear all of these incurable problems.

state hazardous waste generators by imposing differential fees or that the statute is "designed" to conserve the almost unlimited, 100-year capacity of the Emelle facility for in-state interests.

A determination that the Alabama additional fee provision is a valid exercise of state legislative power under the Commerce Clause does not require any departure from this Court's practice of "routinely" striking down discriminatory state laws except in unique circumstances. *New Energy Co. v. Limbach*, 486 U.S. at 274. In most cases, a state law which is discriminatory on its face is also discriminatory in fact because it imposes burdens exclusively on out-of-state interests and does not impose any corresponding burdens on in-state interests. Although the additional fee provision is discriminatory on its face, it is a rare example of a facially discriminatory provision that is not discriminatory in fact because state law imposes corresponding burdens on in-state and out-of-state interests. Thus, for example, recognition of the validity of the additional fee provision is completely consistent with this Court's determination in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) that a state law prohibiting the importation of garbage for disposal in the State's sanitary landfills violated the Commerce Clause. In that case, all of the burdens of the state law fell on out-of-state interests that were completely barred from access to the State's landfills, and no burdens were imposed on in-state interests. *Id.* at 628.

D. The Additional Fee Is Consistent With The Principle That "Our Economic Unit Is The Nation"

The suggestions (Pet. Br. at 38; United States Br. at 14-15) that a judgment sustaining the additional fee would promote "Balkanization" of the economy

and impair the interstate market for the commercial disposal of hazardous wastes are at war with reality. Congress and the National Governors' Association have both found that differential fees for in-state and out-of-state wastes are consistent with the "basic principle that 'our economic unit is the Nation.'" *Hughes v. Oklahoma*, 441 U.S. at 339 (quoting *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537 (1949)). Congress, in a closely analogous context, has determined that state laws imposing higher fees for disposal of out-of-state wastes than for in-state wastes are consistent with the maintenance of a national market. Under one set of the provisions of the Low Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b-2021i, States may impose higher fees on imported low level radioactive wastes.[17] The National Governors' Association has also concluded that differential fees are consistent with interstate cooperation in the disposal of hazardous wastes.[18]

Even more significantly, the EPA has determined that South Carolina regulations imposing higher fees for the disposal of out-of-state hazardous wastes than for in-state hazardous wastes are valid under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 *et seq.*, and the agency's implementing regulations, 50 Fed. Reg. 46437 (1985). *See Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 785 n.2 (4th Cir. 1991). The EPA ex-

[17] New York has questioned whether other provisions of this Act are proper exercises of Congress's power under the Commerce Clause. *See generally* Brief of Petitioner New York State in *New York v. United States* (Nos. 91-543, 91-558, 91-563).

[18] See note 14, *supra*.

pressly found that differential fees imposed on in-state and out-of-state hazardous wastes are "not an unreasonable impediment or restriction on the flow of waste into the State." 50 Fed. Reg. 46440 (1985). A judgment that the Alabama additional fee violates the Commerce Clause would create a significant disparity between South Carolina's and Alabama's hazardous waste disposal programs. If this Court has any doubts about the validity of the additional fee under the Commerce Clause, resolution of the questions (1) whether Congress has authorized the EPA to approve differential fees, and (2) whether the Alabama additional fee is consistent with RCRA and with EPA's implementing regulations, would avoid both this anomaly and a potentially unnecessary decision of the significant constitutional issue raised in this case.[19]

The actual effects of Alabama's additional fee are consistent with EPA's determination that South Carolina's differential fees are not "an unreasonable impediment or restriction on the flow of waste into the State." *Id.* The imposition of the additional fee in 1990 has not had any significant effect on the high percentage of out-of-state hazardous wastes deposited at the Emelle facility, and it has not impaired the interstate market for the disposal of hazardous wastes. Moreover, a judgment sustaining the additional fee

[19] The state courts below did not address EPA's approval of South Carolina's differential fees. *See* Pet. App. at 1a-100a (opinions of the Alabama Supreme Court and the Alabama Circuit Court). The questions are complex. *See Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d at 789-95. In these circumstances, if this Court determines that these questions should be resolved, it would be appropriate to vacate the judgment below and remand for the purpose of making an initial determination.

and recognizing the State's power to match in-state and out-of-state burdens and benefits by assessing an additional fee for the disposal of out-of-state hazardous waste would provide an incentive for the States to maintain existing facilities and to open new facilities. Conversely, a judgment invalidating the additional fee may discourage the States that do not have commercial hazardous waste landfills from entering the market and may encourage States that permit the operation of such facilities to withdraw from the interstate market.[20] Recognition of the States' power to balance burdens and benefits by assessing differential fees is particularly important because the federal regulatory program has failed to provide for additional commercial hazardous waste landfills.[21]

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[20] Given the position of the National Governors' Association that differential fees "compensate importing states for the significant costs, risks, and other burdens they bear as hosts to hazardous waste management facilities used by other states," *Policy Positions* at 186, invalidation of the additional fee may well have more dire consequences for the interstate market. States could, of course, completely prohibit the disposal of both in-state and out-of-state hazardous wastes in landfills. *See Philadelphia v. New Jersey*, 437 U.S. at 626; *see also* Ray Vaughan, *Toxic Destiny: Changing Alabama's Future as a Hazardous Waste Dumping Ground*, 43 Ala. L. Rev. 75 (1991) (suggesting that if States condemn privately-owned commercial hazardous waste landfills and undertake government operation, they will be able to prohibit completely the importation of out-of-state hazardous wastes).

[21] This failure has had the effect of saddling States like Alabama, that had large commercial hazardous waste landfills in operation before the enactment of RCRA, with the brunt of the nation's hazardous waste disposal problems. *See* Brief of South Carolina, *et al.* as *Amici Curiae* in Support of Respondents.

CONCLUSION

The judgment of the Supreme Court of Alabama should be affirmed.

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